IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITR No.36 of 1990
Date of decision:22.9.2006

The Commissioner of Income Tax, Patiala.

....Petitioner

versus

M/s Sohana Woollen Mills, Ludhiana.

Respondent.

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. SK Garg Narwana, Advocate, for the revenue.
Mr. HO Arora, Advocate.
Mr. SK Mukhi, Advocate.

JUDGMENT:

Following question of law has been referred for opinion of this Court by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, arising out of its order dated 8.4.1983 in ITA No.1076/ASR/79, in respect of assessment year 1975-76:-

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in annulling the order passed by the Commissioner of Income Tax under section 263 of the Income Tax Act, 1961?"

Facts noticed by the Tribunal in the statement of case are that :-

> "The assessee held certain machinery and was in possession of a permit obtained from the Textile Commissioner for the working of 1200 spindles for the manufacture of woollen worsted yarn. The said 1200 spindles were a part of the machinery to be sold vide an agreement dated 26.7.1974. The assessee sold some

machinery which was detailed in annexure 'A' with the aid agreement, besides also sold the permit in respect of 1200 spindles. The agreement as per which the said machinery and permit were sold, finds place in para 2 of the Tribunal's order. In the course of filing the return, the assessee worked out the profit under section 41(2) amounting to Rs.51067/- and capital gains amounting to Rs.55,006/- subject to statutory deduction and returned the same in its total income. Besides in Part III of the return, the assessee had shown a sum of Rs.1 lakh on account of sale of permit from the Textile Commissioner in respect of 1200 spindles and marked the same as the amount receivable on account of goodwill. The income Tax Officer accepted the return filed by the assessee with the following observations in the relevant assessment order pertaining to profit under section 41(2) and capital gain in respect of sale of part of machinery:-

"....During the relevant previous year, the assessee firm sold a part of the machinery and thereon earned profit under section 41(2) as well as capital gains. After examining the accounts and discussion with the assessee, net income is assessed at Rs.99000/-."

The amount of Rs.98380/- returned by the assessee included the computation of profit under section 41(2) and capital gains on sale of machinery. The Commissioner of Income Tax on the strength of the audit note and basis of proforma for proposal under section 263 made by the Income Tax Officer, extracted and placed in para 8 of the Tribunal's order with section 263(1) about the same, initiated proceedings.

When this action of the Commissioner of Income Tax came to be disputed by the assessee before the Tribunal, the Tribunal placed in its order the agreement, the fact that the assessee had disclosed in part

> III of its return sale of spindles and amount of goodwill earned thereon and section 63(1) and also the proforma and held that the Commissioner of Income Tax was in error while assuming jurisdiction under section 263 on the type of objection made by the audit and, therefore, annulled the said order under section 263 in the light of the detailed discussion available in the Tribunal's order."

We have heard learned counsel for the parties and perused the record.

Learned counsel for the revenue submitted that invocation of jurisdiction under section 263 of the Income Tax Act, 1961 (for short, 'the Act') was justified as consideration for the machinery sold was Rs.3,50,000/- and not Rs.2,50,000/-. It was submitted that in the agreement, it was nowhere specified that a sum of Rs.1 lac was consideration for the permit for 1200 spindles.

On the other hand, learned counsel for the assessee submitted that as per statement of case itself, the assessee had sold the permit in respect of 1200 spindles also and in Part-III of the return, a sum of Rs.1 lac was shown as sale of permit.

Learned counsel for the assessee submitted that jurisdiction under section 263 of the Act could not be exercised by the CIT, as rightly held by the Tribunal. It was submitted that the order of the Assessing Officer could not be held to be erroneous or prejudicial to the interest of the revenue. Reliance has been placed on judgments in **Jeewanlal (1929) Limited v. Additional CIT and others,** (1977) 108 ITR 406 (Cal.), to submit that Commissioner can exercise power under section 263 of the Act only on application of his own mind and not merely on a note of an audit party; **Indian and Eastern Newspaper Society v. CIT, New Delhi,** (1979) 119 ITR 996 (SC), to submit that opinion of internal audit party on point of law did not constitute information for purposes of Section 147(b) of the Income Tax Act; **CIT, Bangalore v. B.C.Srinivasa Setty,** (1981) 128 ITR 294 (SC) to submit that transfer of goodwill does not give rise to a capital gain; **CIT v. New Suraj Transport Corporation (P) Limited,** (1992) 194 ITR 458 (P&H) to submit that route permit was a self generating asset and

consideration for its transfer was not assessable as capital gains.; **CIT v. V.Prakashan,** (1995) 211 ITR 119 (Kerala) to the same effect and **Rayon Silk Mills v. CIT**, (1996) 221 ITR 155(Guj.) to submit that self generated goodwill did not attract capital gains.

A reference to the provisions of section 263 of the Act shows that jurisdiction thereunder can be exercised if the Commissioner finds that the order of the Assessing Officer was erroneous and prejudicial to the interest of revenue. Mere audit objection and merely because a different view could be taken, were not enough to say that the order of the Assessing Officer was erroneous or prejudicial to the interest of the revenue. The jurisdiction could be exercised if the Commissioner was satisfied that the basis for exercise of jurisdiction existed. No rigid rule could be laid down about the situation when the jurisdiction can be exercised. Whether satisfaction of the Commissioner for exercising jurisdiction was called for or not, has to be decided having regard to a given fact situation.

In the present case, the Tribunal has held that the assessee had disclosed that out of sale consideration, a sum of Rs.1 lac was to be received for sale of permit. If that is so, there was no error in the view taken by the Assessing Officer and no case was made out for invoking jurisdiction under section 263 of the Act.

In view of the above, the question referred is answered against the revenue and in favour of the assessee.

Reference is disposed of accordingly.

(Adarsh Kumar Goel)
Judge

Sept. 22, 2006 (Rajesh Bindal)
'gs' Judge